TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 216.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

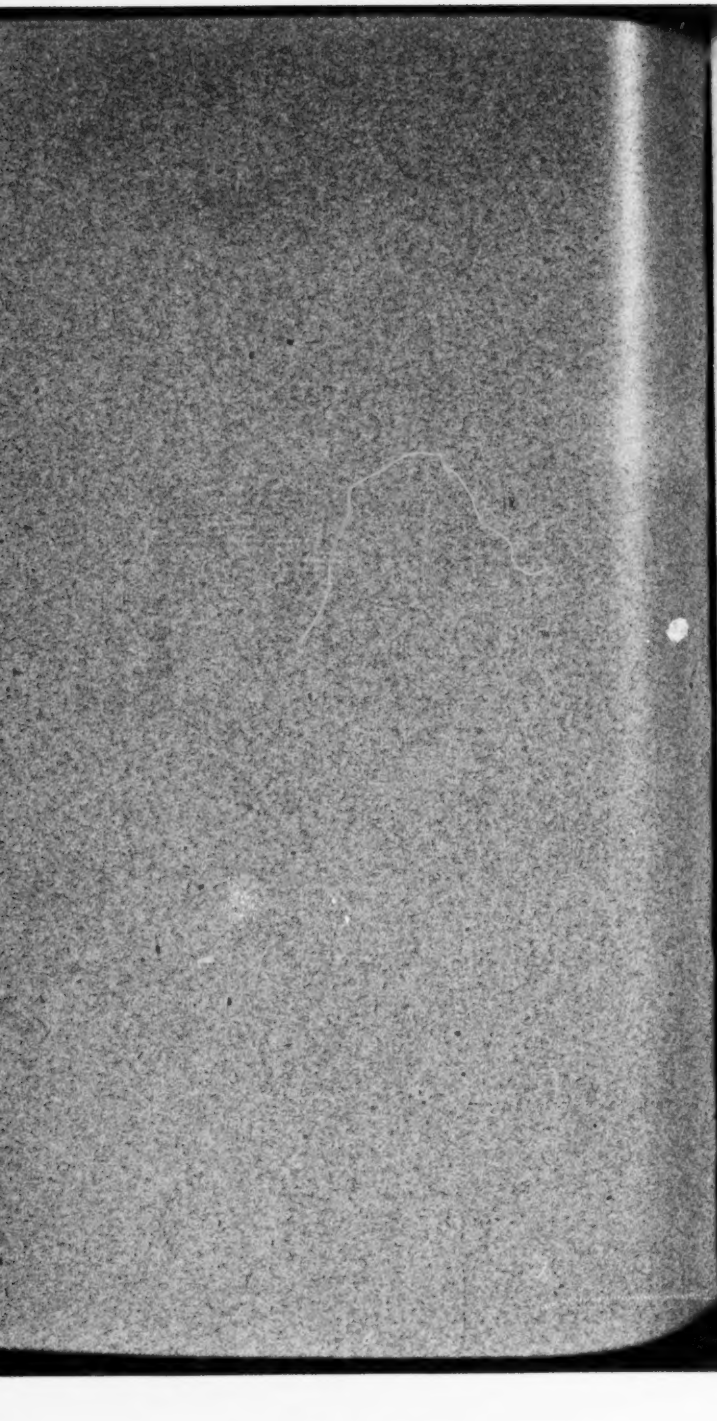
vs.

NANCY B. CLARKE, JOHN H. PERRY, GUARDIAN AD LITEM OF NANCY B. CLARKE, AND HENRY P. CLARKE, AS ADMINISTRATOR OF THE PERSONAL ESTATE OF JULIA CLARKE, DECEASED.

IN ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

FILED FEBRUARY 18, 1899.

(17,303.)



SU

NANC
LIT
AS
JUL

IN ERI

Writ of
Citation
Proof o
Bond. .
Assignm
Petition
Return
Proceed
Ap
Or
Or
Mo
Or
Or

(17,303.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 718.

HENRY P. CLARKE, PLAINTIFF IN ERROR,

vs.

ANCY B. CLARKE, JOHN H. PERRY, GUARDIAN AD LITEM OF NANCY B. CLARKE, AND HENRY P. CLARKE, AS ADMINISTRATOR OF THE PERSONAL ESTATE OF JULIA CLARKE, DECEASED.

ERROR TO THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT.

INDEX.

	Origina.	Print.
it of error	1	1
ation	4	2
of of service of citation	5	2
d	6	2
ignment of errors	10	4
tion for writ of error	14	5
urn to writ of error	18	6
ceedings in probate court	19	6
Application of Henry P. Clarke, administrator	19	6
Order to hear application	19	7
Order ascertaining heir and distributee	20	7
Motion for appeal to superior court	21	8
Order allowing appeal	22	9
Order for notice of appeal	23	9

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., APRIL 11, 1899.

	Original.	Print.
Proof of service of appeal, &c	23	10
Clerk's and judge's certificates	24	10
Proceedings in superior court	25	11
Order of notice	25	11
Proof of service of appeal	26	11
Order appointing guardian *ad litem*	26	12
Reasons of appeal	27	12
Reply to reasons of appeal	28	13
Findings of fact	28	13
Exhibit A—Will of Julia H. Clarke	30	15
B—Codicil to will of Julia H. Clarke	32	17
Reservation of questions of law	33	18
Clerk's certificate	34	18
Judgment of supreme court of errors (first appeal)	35	18
Opinion of supreme court of errors (first appeal)	36	19
Proceedings in probate court	53	27
Petition of Henry P. Clarke, administrator	53	27
Order to hear application	54	28
Order ascertaining heir and distributee	54	28
Motion for appeal to superior court	55	29
Order allowing appeal	56	29
Order for notice of appeal	57	30
Proof of service of appeal, &c	57	31
Clerk's and judge's certificates	58	31
Proceedings in superior court	59	32
Order of notice	59	32
Proof of service of appeal	60	32
Order appointing guardian *ad litem*	60	33
Reasons of appeal	61	33
Reply to reasons of appeal	62	34
Findings of fact	62	34
Exhibit A—Will of Julia H. Clarke	64	36
B—Codicil to will of Julia H. Clarke	66	37
Reservation of questions of law	67	38
Judgment	68	39
Findings of fact	68	39
Exhibit A—Will of Julia H. Clarke	70	41
B—Codicil to will of Julia H. Clarke	72	42
Appellant's notice of appeal	75	44
Appellant's appeal	75	44
Clerk's certificates	76	45
Judgment of supreme court of errors (second appeal)	77	46
Opinion of supreme court of errors (second appeal)	78	46
Clerk's certificate	80	47

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of errors of the State of Connecticut, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of errors, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry P. Clarke, appellant, and Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as administrator of the personal estate of Julia Clarke, deceased, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in ques-

2 tion the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] 1. Supreme Court of the United States. Henry P. Clarke, plaintiff in error, *v.* Nancy B. Clarke, John H.

Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as adm'or of the personal estate of Julia Clarke, dec'd, d'f'ts. Writ of error. Or'g'l.

4 UNITED STATES OF AMERICA, *ss:*

To Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as administrator of the personal estate of Julia Clarke, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of errors of the State of Connecticut, wherein Henry P. Clarke is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this eighth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

5 [Endorsed:] 3. The Supreme Court of the United States. Henry P. Clarke, plaintiff in error, *v.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as adm'or of the personal estate of Julia Clarke, d'f'ts in error. Citation in error. Or'g'l.

[Endorsed:] Due and legal service acknowledged Dec'r 22, 1898. Henry P. Clarke as adm'or of Julia Clarke. Due and legal service acknowledged Feb'y 9, 1899. Jno. H. Perry, guardian *ad litem* for Nancy B. Clarke.

On this 24th day of December, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared A. H. Oliver before me, the subscriber, Z. W. Nichols, notary public, and makes oath that he delivered a true copy of the within citation to Nancy B. Clarke.

A. H. OLIVER.

Sworn to and subscribed the 24 day of December, A. D. 1898.

{ Seal of Z. W. Nichols, Notary Public, Transylvania County, N. Carolina. }

Z. W. NICHOLS,
Notary Public.

6 Know all men by these presents that we, Henry P. Clarke, as principal, and George W. Waring, as surety, are held and firmly bound unto Nancy B. Clarke, John H. Perry, guardian *ad*

litem of Nancy B. Clarke, and Henry P. Clarke, administrator of the personal estate of Julia Clarke, deceased, in the full and just sum of five hundred dollars, to be paid to the said obligees, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, A. D. 1898.

Whereas lately, at a session of the supreme court of errors of the State of Connecticut, in a suit depending in said court between the principal of this bond, obligor, plaintiff in error, and the said obligees, defendants in error, a judgment was rendered against the said plaintiff in error, and the said plaintiff in error having
7 obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said defendants in error, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said plaintiff in error shall prosecute said writ of error to effect and answer all costs if he shall fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HENRY P. CLARKE. [L. S.]
(Signed) GEO. W. WARING. [L. S.]

Sealed and delivered in the presence of—
(Signed) JOS. J. MOORMAN.

THE STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appeared before me Joseph J. Moorman and made oath that he saw the within-named Henry P. Clarke and
8 George W. Waring sign, seal, and as their act and *and* deed deliver the within written bond.

(Signed) JOS. J. MOORMAN.

Sworn to and subscribed before me this — day of ——, 1898.
(Signed) J. S. VERNER, *N. P., S. C.*

[NOTARIAL SEAL.]

THE STATE OF SOUTH CAROLINA, }
County of Richland. }

Personally appeared before me Henry P. Clarke and George W. Waring and severally swear each of and for himself that he is worth the sum of five hundred dollars, over all his debts and liabilities and exclusive of property exempt by law from execution.

(Signed) HENRY P. CLARKE.
(Signed) GEO. W. WARING.

Sworn to and subscribed before me this — day of ——, A. D. 1898.

(Signed) JOHN S. VERNER,
Notary Public, S. C.

[NOTARIAL SEAL.]

Approved:
(Signed) R. W. PECKHAM,
Associate Justice Supreme Court U. S.

9 [Endorsed:] 7. Bond of Henry P. Clarke and Geo. W. Waring to Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke, adm'r of the personal estate of Julia Clark, dec'd. Copy.

10 HENRY P. CLARKE, Plaintiff in Error,
v.
NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad Litem* of Nancy B. Clarke, and Henry P. Clarke, as Administrator of the Personal Estate of Julia Clarke, Deceased, Defendants in Error.

The plaintiff in error makes the following assignment of errors, which he avers occurred in the final judgment of the supreme court of errors of the State of Connecticut, April term, 1898, herein: That error was committed in deciding against the right specially set up and claimed by him under article four, section one, Constitution of the United States, in this, that full faith and credit were not given to the judicial proceedings of the State of South Carolina, to wit, to the judgment of the court of common pleas for Richland county, South Carolina, and the judgment of the supreme court of
11 the State of South Carolina, March 18, 1896, affirming the same, in the case of Henry P. Clarke, as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke under said will, against Nancy B. Clarke, ordering, adjudging, and decreeing that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personaltys at the time of her death of all her real estate, of whatsoever description and wheresoever situated, and that Henry P. Clarke, as executor, receive, administer, and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree; and in deciding, on the contrary, that the will of said
12 Julia H. Clarke did not work an equitable conversion into personalty at the time of her death of the real estate of the said Julia H. Clarke, situate in the State of Connecticut, and that the said Nancy B. Clarke, defendant in error, was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke, in the State of Connecticut, which interest passed as real estate under her said will; and the plaintiff prays that the said judgment be reversed and altogether held for naught, and that he

may be restored to all things which he hath lost by occasion of said judgment.

LE ROY F. YOUMANS,
Att'y for P'ff in Error.

13 [Endorsed:] 9. Henry P. Clarke, plaintiff in error, *v.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke, as adm'r of the personal estate of Julia Clarke, def'ts in error. Assignment of errors and prayer for reversal. Le Roy F. Youmans, att'y for pl'ff in error. Copy.

14 HENRY P. CLARKE, Plaintiff in Error,
v.
NANCY B. CLARKE, JOHN H. PERRY, Guardian *ad Litem* of Nancy B. Clarke, and Henry P. Clarke as Administrator of the Personal Estate of Julia Clarke, Deceased, Defendants in Error.

To the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States:

The petition of the above-named plaintiff in error showeth that at April term, 1898, the supreme court of errors of the State of Connecticut, the highest court of that State in which a decision could be had, entered a final judgment herein in favor of the defendant Nancy B. Clarke against the plaintiff in error, in which judgment certain errors were committed to the prejudice of the plaintiff in error, among which are these, to wit: In deciding against the right specially set up and claimed by the said plaintiff
15 in error under article four, section one, Constitution of the United States, in this, that full faith and credit were not given to the judicial proceedings of the State of South Carolina, to wit, to the judgment of the court of common pleas for Richland county, South Carolina, and the judgment of the supreme court of the State of South Carolina, March 18, 1896, affirming the same in the case of Henry P. Clarke, as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke under said will, against Nancy B. Clarke, ordering, adjudging, and decreeing that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that Henry P. Clarke, as executor, receive, administer, and account for the same as personalty, and that he is by the said
16 will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree, and in deciding, on the contrary, that the will of said Julia H. Clarke did not work an equitable conversion into personalty at the time of her death of the real estate of the said Julia H. Clarke situate in the State of Connecticut, and that the said Nancy B. Clarke, defendant in error, was sole heir of a certain undivided interest of the real estate of the said Julia H. Clarke in the State of Connecticut, which interest passed as real estate under her said will. Wherefore

the plaintiff in error prays that a writ of error may issue in this behalf to the supreme court of errors of the State of Connect-
17 icut for the correction of errors so complained of, and that a transcript of the record and proceedings in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

LE ROY F. YOUMANS,
Attorney for Plaintiff in Error.

December 7, 1898.

[Endorsed:] 11. Henry P. Clarke *v.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, and Henry P. Clarke as adm'or of the personal estate of Julia Clarke, dec'd. Petition for writ of error. Le Roy F. Youmans, att'y for Henry P. Clarke.

18 To all persons to whom these presents shall come, Greeting:

In pursuance of the command of the writ of error within, I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut for the third judicial district, herewith transmit a true copy of the record and all proceedings in the case of Henry P. Clarke's appeal from probate, lately pending in the supreme court of errors of the State of Connecticut for the third judicial district, in the words and figures following, to wit:

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said State of Connecticut, this 16th day of February, 1899.

WM. R. SHELTON, *Clerk.*

19 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Reservation.

Supreme Court of Errors, Third Judicial District, October Term, 1897.

Application of Henry P. Clarke, Administrator.

Estate of JULIA CLARKE, late of Columbia, South Carolina, but Leaving Real Estate in this District, Deceased.

To the honorable probate court for the district of Bridgeport:

The petition of the subscriber respectfully showeth:

1st. That the deceased, whose estate is now in course of settlement in this district, died intestate and possessed of real estate in this district, as appears more fully by the inventory filed May 28, 1897.

2nd. That divers persons claim to be entitled to have the said real estate set out and distributed to them.

Wherefore, your petitioner makes request that the court hears

ir claims and ascertain to whom this estate shall be set out and tributed.

(Signed) HENRY P. CLARKE,
Administrator,
By STODDARD & BISHOP,
His Attorneys.

Dated at Bridgeport, this 29th day of May, 1897.

STRICT OF BRIDGEPORT, } ss:
Probate Court, }

tate of JULIA CLARKE, Late of the City of Columbia, South Caro-ina, Deceased, but Leaving Real Estate in the City of Bridgeport, n said District.

MAY 29, 1897.

Upon the application of Henry P. Clarke, administrator on said ate as per application on file more fully appears, it is—

Ordered, that said application be heard and determined at the bate office, in Bridgeport in said district, on the 14th day of ne, A. D. 1897, at 11 o'clock in the forenoon, and that notice be n of the pendency of said application and the time and place hearing thereon, by sending by mail, postage paid, a copy of said lication and of this order to the parties in interest on or before ne 1st, 1897, and return make to this court.

ALBERT M. TALLMADGE, *Judge.*

Order of Probate Court Ascertaining Heir and Distributee.

At a court of probate holden at Bridgeport, within and for the trict of Bridgeport, on the third day of July, 1897.

the Matter of the Application of HENRY P. CLARKE, Administrator of the Intestate Estate of JULIA CLARKE, Praying This Court to Ascertain the Heirs and Distributees of said Estate.

The application aforesaid came to this court on the 29th day of ay, 1897, and notice of the hearing thereon was given by the applicant, in all respects according to the order pertaining thereto as file. This court further finds that Nancy B. Clarke hereinafter med, received actual notice thereof.

At the time named in said order the applicant appeared. The urt found that the deceased died at the age of about five months, aving her surviving a father, the said Henry P. Clarke, but no other, and a sister, Nancy B. Clarke, of Columbia, in the State of uth Carolina, but no other brothers or sisters or issue of deceased others or sisters, and that the said Nancy B. Clarke is a minor out eight years of age.

Whereupon this court appointed John H. Perry, Esq., of Fairfield, Fairfield county, guardian *ad litem* for the said Nancy B. Clarke, by said appointment on file will more fully appear. Said mat-r came thence by continuance to the present time, when the said

applicant and the said guardian *ad litem* appeared and were fully heard thereon.

Upon such hearing, this court finds that the intestate was domiciled in the State of South Carolina at the time of her decease; that the entire inventoried assets of her estate in this State consist of an undivided interest in certain real estate, situated in the town of Bridgeport, of the value of about $—, which said interest was derived from the will of her mother, Julia H. Clarke, who died about four months prior to the decease of the intestate domiciled in the State of South Carolina, an exemplified copy of whose will "and the decision of the supreme court of South Carolina interpreting the same in a case in which the petitioner herein was plaintiff and Nancy B. Clarke was defendant," is on file and of record in this court and hereby referred to, and whose estate is as yet unsettled and undistributed.

Wherefore this court finds and decrees that the sole heir and distributee of the estate of the intestate is her aforesaid sister, Nancy B. Clarke.

ALBERT M. TALLMADGE, *Judge.*

21 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Court of Probate, District of Bridgeport, July 21, 1897.

In re Estate JULIA CLARKE, Late of the City of Columbia, State of South Carolina, Deceased, but Leaving Estate in This District.

To the honorable court of probate in and for the district of Bridgeport, in the county of Fairfield, State of Connecticut, Greeting:

Henry P. Clarke, of the city of Columbia, State of South Carolina, respectfully represents:

1. That he is the father and only surviving parent of the said Julia Clarke, deceased.

2. That he is an heir-at-law and distributee of the estate of the said Julia Clarke, deceased.

3. That he is aggrieved by the order and decree of this court, made on the 3rd day of July, A. D. 1897, as by said decree on file more fully appears, declaring one, Nancy B. Clarke, of said city of Columbia, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased.

The said Henry P. Clarke therefore moves an appeal from the said decree of this court of probate to the superior court, to be holden in and for the county of Fairfield, and State of Con-
22 necticut (in which county said court of probate was held) on the first Tuesday of September, A. D., 1897, and he offers and files a sufficient bond with surety to the State of Connecticut, to prosecute said appeal to effect and answer all damages in case he fail to make his said appeal and plea therein good.

Dated at Bridgeport this 21st day of July, 1897.

HENRY P. CLARKE,
By STODDARD & BISHOP,
His Attorneys.

At a court of probate held at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, South Carolina, Deceased.

Whereas, Henry P. Clarke, of said Columbia, appeared in court and filed his motion in writing, alleging in substance that he is the father and one of the heirs-at-law of the said Julia Clarke, deceased, and as such is interested in said estate, and is aggrieved by the decree of this court dated the 3rd day of July, A. D. 1897, declaring Nancy B. Clarke, of said city of Columbia, South Carolina, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased, and

Whereas, he therefore moves an appeal from the said decree of this court to the superior court of this State, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, A. D. 1897, and offers to give a sufficient bond of prosecution as by said motion on file more fully appears.

This court finds that the said Henry P. Clarke is the father of said deceased, and as such is interested in said estate in such manner that his rights were and are affected by said decree, and therefore allows the said appeal.

And the said Henry P. Clarke lodged in court his bond to the State of Connecticut, in the sum of one hundred dollars, with Wm. D. Bishop, Jr., of Bridgeport, in said county of Fairfield, as surety, conditioned that the said Henry P. Clarke shall prosecute his appeal to effect, and answer all damages in case he fail to make his said appeal and plea therein good, and this court approves and accepts said bond, and orders that it be recorded and lodged on file.

Attest: CHARLES H. PECK,
Acting Judge.

23 At a court of probate holden at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, S. C., but Leaving Estate in said District, Deceased.

Whereas Henry P. Clarke, of said Columbia, the father of said deceased, has moved an appeal to the superior court, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, 1897, from the decree of this court made on the 3rd day of July, A. D. 1897, declaring Nancy B. Clarke to be the sole heir and distributee of the estate of said deceased, which appeal has been allowed:

Therefore, pursuant to the statute in such case provided:

Ordered, that notice of said appeal be given to all persons interested therein, viz., by some proper officer, by leaving with Henry P. Clarke, administrator on said estate, and with John H. Perry, guardian *ad litem* of Nancy B. Clarke, or at his usual place of abode, or by mailing in a registered letter addressed to Henry P. Clarke,

administrator, Columbia, South Carolina, a true and attested copy of the original motion and order, allowing said appeal, at least 12 days before the session of said court to which said appeal is taken, and return made to the court.

Attest: CHARLES H. PECK,
Acting Judge.

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT, *August 12th*, 1897.

Then and there and by virtue hereof, I made service of the within and foregoing original appeal, motion and order, by depositing in the post-office at Bridgeport, Connecticut, postage paid by registered letter, addressed to Henry P. Clarke, administrator, Columbia, South Carolina, a true and attested copy hereof, and afterwards on the same day, in the town of Fairfield, I left a like true and attested copy hereof at the usual place of abode of John H. Perry, in said town of Fairfield, Connecticut.

Attest: PETER DOOLAN, JR.,
Deputy Sheriff for Fairfield County.

24 *Fees.*

Travel	$3 00
1 copy	1 00
2 services	24
3 endorsements	24
Postage	12
	$4 60

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate within and for the district of Bridgeport, in said county of Fairfield, and keeper of the records and seal thereof, hereby certify that I have examined the within and foregoing copy of the original motion of appeal and orders of said court thereon, *in re* estate of Julia Clarke, late of the city of Columbia, State of South Carolina, and have compared all of the foregoing with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

[SEAL.] PATRICK PHELAN, *Clerk.*

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT.

I, Albert M. Tallmadge, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Patrick Phelan, whose name is above

written and subscribed, is, and was at the date thereof, clerk of the court of probate, within and for the district of Bridgeport, in said Fairfield county, and keeper of the records and seal thereof, duly commissioned and sworn, that I am well acquainted with his signature, and know the above to be his, and that the above certificate by him made is in due form to authenticate the records, files and proceedings of said court.

In testimony whereof, I have hereunto set my hand this 27th day of August, A. D. 1897.

ALBERT M. TALLMADGE, *Judge.*

25 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Albert M. Tallmadge, whose name is within written and subscribed, is, and was at the date thereof, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said Fairfield county, duly commissioned and sworn; that I am well acquainted with his signature, and know the above to be his.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

[SEAL.] PATRICK PHELAN, *Clerk.*

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Order of Notice.

STATE OF CONNECTICUT, } ss:
Fairfield County, }

BRIDGEPORT, *Oct.* 4, *A. D.* 1897.

Upon the appeal of the said Henry P. Clarke from the order and decree of the court of probate, for the district of Bridgeport, now pending in the superior court in and for Fairfield county.

It appearing to and being found by the subscribing authority, that Nancy Barnum Clarke, appellee in the above-entitled case, is absent from this State, residing in Columbia, State of South Carolina.

Therefore ordered, that notice of the pendency of said appeal be given by leaving a copy of said appeal and this order of notice with the said Nancy Barnum Clarke, on or before the 11th day of October, A. D. 1897, by some proper officer or indifferent person.

WM. R. SHELTON,
Clerk of the Superior Court for Fairfield County.

26 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Proof of Service of Appeal and Order on Nancy Barnum Clarke.

Personally appears before me, Thomas D. Green, and made oath that on the eighth day of October, 1897, he served Nancy Barnum

Clarke with a copy of Henry P. Clarke's appeal from the order and decree of the court of probate for the district of Bridgeport, now pending in the superior court in and for Fairfield county, State of Connecticut, by leaving with her a copy of said appeal at Asheville, N. C., where she temporarily resides with her father, the said Henry P. Clarke, and that he also left with her a copy of the notice of the pendency of said appeal on or before the 11th day of October, 1897, and deponent says that he is not related to either Henry P. Clarke or Nancy Barnum Clarke and has no interest in said appeal.

Sworn to before me Oct. 8th, 1897.

F. C. H. DUKES,
Notary Public.

[NOTARIAL SEAL.]

(Filed Oct. 28, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Order of Court Appointing Guardian ad Litem.

It appearing to the court that Nancy B. Clarke, appellee in the above-entitled action, is an infant of the age of nine years and that she has been duly personally served with the appeal and order of notice in the above-entitled action, and an application having been duly made to the court for the appointment of a guardian *ad litem* to appear and defend said action on her behalf; and it appearing to the court that John H. Perry, Esq., is a fit and proper person to act as such guardian *ad litem*, it is hereby

Ordered, that the said John H. Perry be and he is hereby appointed such guardian *ad litem* and is authorized and directed to appear and defend said action in her behalf.

By the court:

WM. R. SHELTON, *Clerk.*

27 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield *Court*, October 12, 1897.

Reasons of Appeal.

For reasons of appeal in the above-named proceeding, the appellant assigns the following:

I.

1. The estate of the intestate in the State of Connecticut consisted of property all of which is for purposes of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate.

2. The intestate was, at the time of her death, domiciled in the State of South Carolina and her estate has ever since the first day

of February, 1897, been in due process of settlement in the proper courts of that State.

3. By the laws of South Carolina, the appellant was and is entitled to a distributive share in all the personal estate of the intestate.

II.

1. The court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the court consisted of personal property, and the courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees.

III.

1. The court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application.

By STODDARD & BISHOP, *Attorneys.*

(Filed Oct. 12, 1896.
WM. R. SHELTON, *Clerk.*)

28 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Reply to Reasons of Appeal.

Paragraph one of the first reason of appeal is denied.
Paragraph two and three are admitted.
The second and third reasons of appeal are denied.

NANCY B. CLARKE,
By her guardian *ad litem*, JOHN H. PERRY.

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Finding of Facts and Reservation.

Finding.

1. Henry P. Clarke, the appellant, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which then became their domicile of marriage.

2. In 1889, a daughter, Nancy B. Clarke, was born, who still survives, and is the appellee herein.

3. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage.

4. On February 10, 1894, the wife, Julia H. Clarke, died.

5. On May 20, 1894, the daughter, Julia Clarke, died, leaving no creditors.

6. At all times after said marriage the State of South Carolina has been the domicile of the appellant and his family.

7. During coverture and at the day of the dates thereof the said Julia H. Clarke made and executed the will and codicil hereunto annexed and marked Exhibits A and B respectively.

29 8. Said will and codicil were duly established in the court of probate for Richland county in the State of South Carolina, and copies thereof have become part of the files and records of the probate court for the district of Bridgeport, pursuant to the provisions of sec. 550 Gen'l Statutes.

9. The daughter, Julia Clarke, owned no property in Connecticut at the time of her decease except such as had or should come to her under her mother's aforesaid will.

10. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease consisted of $825.25 in personalty, the home plantation in South Carolina valued at $20,000, and real estate in Bridgeport, in this State, valued at $138,000, which last-mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7, 1891, leaving a will under which she took a legacy of $100,000, (paid before said partial distribution) and one-sixth of the residue of his estate.

11. The estate of the daughter, Julia Clarke, referred to in the petition to the court of probate, consisted of an undivided one-third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars.

12. Both real estate and personal property of large value remained in the said Barnum residue at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York and Kansas.

13. Henry F. Clarke (the appellant herein) "as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will" brought suit against Nancy B. Clarke (the appellee herein) in the circuit court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper."

A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged and decreed that the will of the testatrix, Julia H. Clarke,

30 worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is

by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

14. This judgment was upon appeal subsequently affirmed by the court of last resort in South Carolina, as will appear by reference to the report thereof in 46 So. Car., 230, which is hereby made a part hereof, and said decision was considered by the probate court from which the appeal is taken.

15. By the law of the State of South Carolina, the court to which the action was brought, mentioned in paragraph 13 hereof, had jurisdiction both of the persons and of the subject-matter of that suit, and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased.

16. The intestate was at the time of her death domiciled in the State of South Carolina and her estate has, ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

17. Nancy B. Clarke has had actual notice of the pendency of this appeal, and John H. Perry, Esq., has been duly appointed by this court her guardian *ad litem*.

Exhibit A.

I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

First: I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

Second: I direct that a portion of my estate sufficient to produce one thousand dollars ($1,000) annually, shall be safely invested by my executor and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

31 Third: I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars, ($10,000).

Fourth: I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand ($5,000) dollars.

Fifth: The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and beq-eath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

And I give, devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will and direct that no bonds be required of him under either appointment.

In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D. 1891.

JULIA H. CLARKE. [SEAL.]

Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who in her presence and at her request, and in the presence of each other, have signed our names as witnesses thereto.

WILLIAM H. COMLEY, Bridgeport, Conn.
JOSEPH J. ROSE, " "
GEORGE P. CARROLL, " "

32 STATE OF CONNECTICUT, } ss.:
County of Fairfield, }

BRIDGEPORT, *May* 26, 1891.

Personally appeared before me, William H. Comley, Joseph J. Rose and George P. Carroll, who, each being duly sworn by me, deposes and says, that they were present and saw Julia H. Clarke sign the foregoing will and heard her declare the same to be her last will and testament. That she signed said will in the presence of all of said witnesses and they each subscribed said will as witnesses in her presence, in the presence of each other, and at her request, and that at the time of signing said will she appeared to be of lawful age, and they and each of them believe her to have been of sound mind and memory, and they make this affidavit at her request.

WILLIAM H. COMLEY.
JOSEPH J. ROSE.
GEORGE P. CARROLL.

Subscribed and sworn to before me this 26th day of May, A. D. 1891.

[SEAL.] CHARLES SHERWOOD,
Notary Public, State of Connecticut.

EXHIBIT B.

State OF COLUMBIA, }
County of Richland. }

I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same;

First: I hereby ratify and confirm my said will in every respect save as far as any part of it is inconsistent with this codicil.

Second, I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

Three: I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate which shall at that time be invested for her benefit under the second item of this
33 codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death then the investment directed for her benefit under item two of this codicil, shall be and is hereby disposed of as directed in item five of my said will.

Four: I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit as directed in item two of said will, shall then become a portion of my estate and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

In witness whereof I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in the said State, this the 11th day of November, A. D. 1893.

JULIA H. CLARKE. [L. S.]

Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELEANOR R. BENNETT.
JOHN S. VERNER.
F. H. WESTON.

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Fairfield County Superior Court, October 12, 1897.

Reservation.

The court finds the facts in the above-entitled case to be as set forth in the above finding of facts, and with the consent of all the parties to said cause, all the questions of law which may arise or may be raised upon the record in said cause, and as to what advice shall be given and to whom, or what judgment should be rendered in said case, are hereby reserved for the consideration and advice of the supreme court of errors to be held at Bridgeport, within and for the third judicial district, on the fourth Tuesday of October, A. D. 1897.

ELMER, *Judge.*

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

34 Superior Court, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said superior court.

Attest: WM. R. SHELTON, *Clerk.*

Supreme Court of Errors, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court of errors.

Attest: WM. R. SHELTON, *Clerk.*

35 At a supreme court of errors, in the third judicial district, holden at Bridgeport on the fourth Tuesday of October, 1897.

HENRY P. CLARKE'S APPEAL FROM PROBATE.

On reservation by superior court No. 8.

This reservation, presenting questions of law which have arisen on the trial of a case pending in the trial court, as may appear by the certified transcript of record and finding of the trial judge in said case on file in this court, was made by the superior court for Fairfield county on the 12th day of October, 1897, and came to this court at its session at Bridgeport on the fourth Tuesday of October, 1897, when the parties appeared and were fully heard.

Whereupon it is considered and adjudged that the said superior court be, and is hereby, advised as follows: The superior court is advised to affirm the decree of the probate court.

By the court:

WM. R. SHELTON, *Clerk.*

36 HENRY P. CLARKE'S APPEAL FROM PROBATE.

(Argued November 2d, 1897; decided January 5th, 1898.)

BALDWIN, *J.*:

Julia Clarke, of South Carolina, died there in infancy, and at the time of her decease was the owner of real estate in Connecticut. Her interest in it was derived from the will of her mother, Julia H. Clarke, who was also a citizen of South Carolina. This will was admitted to probate in the proper court of that State and a suit for its construction afterwards brought there before a court of equity having jurisdiction of the parties and the subject-matter, which resulted in a decree to the effect that it worked an equitable conversion of all the real estate of the testatrix wherever situated.

If this be the true construction of the will the decree of the court of probate for the district of Bridgeport, from which the present appeal is taken, was erroneous.

The appellant contends that upon this point the South Carolina decree is conclusive, both on the ground that the matter thus became *res adjudicata* and because to hold otherwise would be to deny full faith and credit to the judgments of a sister State.

The only parties to that proceeding were Henry P. Clarke, as executor of the will of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under the will, as plaintiff and Nancy B. Clarke as defendant.

37 The parties to the present proceeding are Henry P. Clarke as the sole appellant, and as appellees Henry P. Clarke, as administrator of the estate of Julia Clarke, deceased, by virtue of letters granted by the court of probate for the district of Bridgeport, Nancy B. Clarke, and John H. Perry, Esq., her guardian *ad litem* by appointment of that court.

It is obvious that the parties thus before us are not the same as the parties to the South Carolina action. There Henry P. Clarke did not appear in his own right, and no one was brought in as a representative of the estate of his deceased daughter, Julia. Here Henry P. Clarke does appear in his own right, and is also present as the proper representative of that estate, but has not been brought in as the executor of his wife's will or as a trustee under it for his daughter Nancy.

If the South Carolina decree had been that the terms of the will did not work a conversion, Henry P. Clarke in his own right would have been free to contest that decision in other proceedings, and so would the administrator of the estate of his daughter Julia. One who occupies a representative position is in that capacity a person totally distinct in the view of the law from himself individually. In an action by an administrator the plaintiff's admissions made before the grant of administration cannot be received. Rockwell *v.* Taylor, 41 Conn., 55. Had Mr. Clarke, before bringing his action in South Carolina, taken out administration there on his daughter's estate and then made himself in that capacity one of the defendants,

it is doubtful whether the judgment would have bound him, as administrator of her estate in Connecticut, when afterwards
38 entrusted with that position, under the laws of another sovereignty, by the court of probate for the district of Bridgeport. Story on the Conflict of Laws, sec. 522. Had a different person been appointed administrator in each State, it is certain that there would have been no privity between them. Stacy *v.* Thresher, 6 How., 44. Estoppels must be mutual. Nancy B. Clarke cannot be bound by the South Carolina decree unless Henry P. Clarke was bound by it, and Henry P. Clarke was bound by it only as executor and trustee under her mother's will; nor can Henry P. Clarke, as a Connecticut administrator, be bound by that decree, as a rule for distributing an estate which during the whole course of the suit in which the decree was rendered had no representative to protect its interests before the court.

A comparison of the South Carolina record with that in the case at bar shows also that the subject-matter of these actions is not the same.

The South Carolina court was called upon to construe the will of a citizen of South Carolina disposing of lands in that and other States. It had jurisdiction to make a final and conclusive disposition of the questions presented so far only as it had power to compel obedience to its decree or as its judgment derived an additional force from the Constitution and laws of the United States.

Courts sit to determine causes and to enforce their determination. It is a general rule that what they cannot enforce they cannot decree. So far as concerns the extraterritorial effect of foreign
39 judgments, this rule is a principle of international law, subject only to such exceptions as may be founded on the consent of parties or the exercise of judicial comity in the rare cases where no one country can accomplish the ends of justice by its own unaided authority. Dicey on the Conflict of Laws, 38–42.

The courts of South Carolina could settle the construction of Mrs. Clarke's will, so far as related to the real estate in that State, and to the whole of her personal estate; but this personal estate is that only which she owned at the time of her decease, together with any for which the executor might become accountable by a lawful conversion of realty into personalty. They could not reach out into other States and issue process to authorize the seizure there of lands to which she had a title. They could only exercise a restraining force upon the parties who were before the court, and only upon them in their relations to each other. Carpenter *v.* Strange, 141 U. S., 87, 105.

Bearing these principles in mind, it is not difficult to ascertain the subject-matter presented to their consideration and disposed of by the judgment which they rendered. It was a definition of what by the laws of South Carolina was the power, duty, and estate of the executor and trustee under the will as between him and Nancy B. Clarke. It was this and nothing more, because the plaintiff could submit to them nothing more.

Whether he had any power, duty, or estate with respect to lands

situated in another State depended upon the laws of that
40 State. Succession to the real estate of a deceased person is regulated at the will of the sover-ign within whose territory it is embraced. It has always been regarded as a matter of grave political consequence. Birtwhistle *v.* Vardill, 7 Clark & Finelly, 895. Ownership of land controls its occupancy and largely influences the character of the population. It determines the source to which governments ordinarily look for their surest, if not their principal, means of financial support. It had in former times, in England and in all her American colonies, an intimate relation to the right of suffrage, and in this State is still a qualification for it under at least one of our municipal charters. 9 Special Laws, 431.

The laws of Connecticut must decide how the lands of Connecticut may be conveyed and inherited, and they make particular provision, in case of intestacy, for the preservation of ancestral real estate in the line of family descent. General Statutes, sec. 632. Upon the death of a land-owner, whether a citizen of the State or not, whoever takes title by succession takes it because these laws concede it to him, not as a right, but as a privilege. It is on this basis that succession taxes are upheld. They constitute part of the terms upon which the grant of the State is conditioned. Mager *v.* Grima, 8 How., 490. A devisee takes by an artificial perpetuation of a testator's will, which survives him for that purpose with a vitality conferred and created by positive law. By that same law the form of its expression is prescribed and limited. Title to land can
41 be conveyed under a testamentary power only when such a conveyance is sufficient under the laws of the territorial sover-ign.

The personal representative of Mrs. Clarke rightfully sought the direction of the courts of her domicil as to the effect of her will upon the estate for which he was or might become accountable before them. As to that matter, the courts of Connecticut could not instruct him. Russell *v.* Hooker, 67 Conn., 24. This was the subject-matter of the South Carolina action, and the decree rendered is conclusive upon those who were parties to it. On the other hand, the subject-matter of the case before us is the ascertainment of those who by the laws of Connecticut are entitled to succeed to certain Connecticut lands which form part of an intestate estate in course of settlement before a Connecticut court of probate. As to this the courts of South Carolina could give no instructions and were asked for none. The whole decree must be taken together in determining its true scope and meaning. The adjudication that the will worked an equitable conversion of all the real estate of the testatrix wheresoever situated is immediately followed by the adjudication "that the plaintiff as executor receive, administer, and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree." It is not to be presumed that the court intended to go beyond its jurisdic-

tion. In directing the plaintiff as executor to receive, ad-
42 minister, and account for all his wife's real estate as per-
sonalty his duty as to the real estate in South Carolina and as to the proceeds of any sales that might be made under the terms of her will of real estate situated out of the State was plainly laid down. These were the instructions which he needed for his protection, and if, in fact, he hereafter receives under the letters testamentary issued to him by the probate court of South Carolina any moneys to be accounted for before that court from sales of real estate in other States they will regulate his disposition of them. The decree relates solely to his powers and functions as an executor and does not speak of those belonging to him as a trustee. The conversion was to be accomplished before any transfers were made to constitute the trust estate. The only subject of adjudication was the proper mode of administering upon the estate of Mrs. Clarke so far as it was or should be in course of settlement before the courts of probate of her own State. Those courts could only deal with the property that had come or might come under their control. McCartney *v.* Osburn, 118 Ill., 403.

The South Carolina decree, therefore, did not estop Nancy B. Clarke from urging in this action in support of her claims as heir of Julia Clarke under the Connecticut statute of distributions that the real estate to be distributed was held by her sister as real estate under their mother's will. Those questions had never before been litigated between her and Henry P. Clarke.

It is unnecessary to inquire whether if he had been a party individually to the South Carolina suit and the principal administrator of the estate of Julia Clarke had also been brought in
43 the court would have had jurisdiction to make a final and conclusive determination as to the effect of the will upon lands in other States and their descent upon the decease of those in whose favor the testatrix disposed of them. Under the conditions which in fact existed its determination did not constitute a binding rule of decision for the court of probate for the district of Bridgeport in the present proceeding, either under the principles of general jurisprudence or the Constitution and laws of the United States. Aspden *v.* Nixon, 4 How., 467, 497.

The decree of that court, from which this appeal is taken, treated the real estate in this State left by Julia Clarke as being real estate to all intents and purposes. If in truth it had become before her death the subject of an equitable conversion, this decree must be reversed, and the reasons of appeal have brought this point directly before the superior court for decision.

Equitable conversion results from the existence of a power to convert realty into personalty or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it.

The will and codicil of Mrs. Clarke directed her executors to pay her debts; to invest a portion of her estate, sufficient to produce an annuity of $1,000, to be paid to her father during his life; to make a similar investment of enough to yield an annuity of $500, to be

paid to another, and to pay a certain legacy of $5,000. As to the residue of her estate, real and personal, wherever situated, she
44 provided that it should "be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust." The husband was made the devisee and legatee of the children's shares in trust for each until the child should become twenty-five years of age, upon which event he was "to pay the whole sum over to" such child, and should the latter previously marry with his approval or, in case of his death, with that of a proper guardian, half of the "share" of such child was to "be paid" to him upon his marriage and "the other half" when he became twenty-five. These provisions were followed by a devise and bequest of the residuary estate "as aforesaid to each and to their heirs and each of them forever."

The personal estate in possession of the testatrix at the time of her decease was inventoried at only $825, but she was also entitled to a residuary interest worth over one hundred thousand dollars in a large estate consisting of both realty and personalty, in course of settlement in this State. It was, therefore, uncertain whether it would be necessary to sell any of her real estate to meet debts and legacies, and we concur with the supreme court of South Carolina in the opinion that there was nothing in the will to work the out and out conversion for which the appellant contends, unless that be the result of the dispositions of the residuary clause. Clarke *v.* Clarke, 46 S. Car., 230, 243.

It was the view of that court that this result did follow from the commingling of the entire residuary estate, both real and
45 personal, in one common mass, and the directions to divide it into equal parts, one to belong to the husband and one to him in trust for each child, and that he "pay over the whole sum" of each daughter's share to her when she becomes twenty-five, or in case of her marrying sooner, with the consent of her father or guardian, that "one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five." We have considered the grounds for this conclusion set forth in the learned opinion of Mr. Justice Pope, with the care demanded by our respect for the distinguished tribunal for which he sp[illegible] and find ourselves unable to yield assent to the train of reason[illegible], so far as it may apply to the effect of the will upon the real estate in Connecticut.

In every case in which a testator owning both real and personal estate, after making particular provisions for debts and legacies, disposes of all the residue of his estate in favor of one or more persons, this residue may be said to be thus commingled or blended in one common mass. He gives it as an entirety, and, unless he otherwise directs, it is given in the precise condition in which it exists, whether real or personal. Mrs. Clarke used apt terms to convey real estate. The phrase "I give, devise, and bequeath" is used in the beginning of the residuary clause and repeated at its close, with the addition of words of limitation descriptive of a fee-

simple estate in lands, and unnecessary for any other purpose. The direction for an equal division between her husband and children is naturally applicable to a division of the property left rather
46 than of its proceeds. The only provisions, indeed, which are particularly relied on in support of the appellant's claims are those as to paying over the whole sum belonging to each child's share upon her attaining the age of twenty-five, and in the event of her marriage under certain conditions half of her share at an earlier period.

It is unquestionable that these terms are appropriate only to a payment of money, but they must be read in connection with the rest of the will. No payment was directed until the beneficiary married or attained the age of twenty-five, and it was then to be made by the trustee, not by the executor. If a conversion of realty into personalty were requisite in order to raise the sums so payable, it could not be requisite until one of those events was in immediate prospect. To turn either real or personal property into money at an earlier time and keep it on hand as money, uninvested, would be of no benefit to the *cestui que trust*. No power of sale to be implied under the circumstances of the case could be exercised by the executor before the estate passed into the hands of the trustee. As the executor was not to make the payments in question, they could furnish no occasion for him to make a conversion, and unless the testatrix cast either upon him or upon the trustee a power and duty of immediate conversion, the decree of the court of probate was correct.

The doctrine of equitable conversion is simply an application of the fundamental principle that equity regards that as done which ought to be done. Unless a sale of the Connecticut real estate ought to have been made as soon as practicable after the decease of
47 the testatrix, it is not to be regarded as having the character of personal estate. If a sale ought to have been made, it is because a power to sell is implied from the terms of the residuary clause and is necessary to give that clause its due effect. The heirs-at-law of Julia Clarke are not to be excluded from the inheritance by anything short of a clear implication from the provisions of the will under which her estate was derived. We are unable to find any implication of a power to make such a sale in favor of Mr. Clarke, either as executor or as trustee. The dominant and controlling words in the fifth article of the will are those by which the testatrix gives, devises, and bequeaths her residuary estate, "real and personal, of whatsoever description and wherever situated," to her husband and children, to be divided equally between them *per capita*, "to each and to their heirs and each of them forever." The provisions for a temporary trust in respect to the share of each child are subsidiary. They are for the sole benefit of the children, and it is highly improbable that they were intended to curtail the beneficial estate absolutely given to their father by requiring that it should be turned into money, either before he received it or as soon as he received it. It is much more natural to suppose that the

word "pay" was used for "transfer," and "sum" as the equivalent of what in the same sentence is described as a "share."

It is suggested that Mrs. Clarke must have known that her real estate was scattered through four States and that the laws of some of these States as to the distribution of intestate estates differed widely from that of South Carolina, and therefore is to be presumed to have intended to provide for the event of the decease of one of her children during minority, by directing such a sale as would make their shares at once subject to the laws of her domicil. The appellant also contends that an obvious motive for directing such a conversion was securing the higher rate of income which would probably be derived from investments made in her own State, as well as the greater safety from having them more immediately under the eye of the trustee. It is evident that both the will and codicil were prepared by counsel familiar with the ordinary terms of testamentary disposition. The codicil was executed at her own home, and the utmost solicitude was evinced in it to protect the interests of those who were to receive her residuary estate, by stating explicitly what the law would have sufficiently implied, that they should ultimately receive the funds set apart for the benefit of the two annuitants. Had it been the desire of Mrs. Clarke that her decease should be followed by an immediate sale of all her lands, her counsel could have found no difficulty in expressing this with equal distinctness.

48

The claim is made, and is not wholly without countenance in reported cases, that an intent to convert may be implied, in the absence of any positive direction to sell or of any absolute necessity to sell, if the will so blends together real and personal estate as clearly to show that the testator meant to create a common fund out of both, and to bequeath it as money. Hunt's and Lehman's Appeal, 105 Pa. St., 128, 141. No general residuary devise and bequest can be given such an effect as respects lands in Connecticut, unless from the whole scheme of the will or the particular language employed a power of sale is clearly implied. Conversion is effected by sale. Equitable conversion is effected by a power to sell and a duty to sell. It is not enough to manifest an intent that lands shall pass as money unless there is also, either in terms or by implication, a grant of the means of turning it into money. Hobson *v.* Hale, 95 N. Y., 588; Hale *v.* Hale, 125 Ill., 399; 17 Northeastern Reporter, 470.

49

If the question were one not directly involving the mode of passing title to lands in this State, the rules of international comity might require us to accept the interpretation of the will established in the courts of South Carolina. Rockwell *v.* Bradshaw, 67 Conn., 8, 14. Such would be the case, for instance, if the point in controversy were whether a certain devise of land in this State, which was inoperative under our laws for want of some statutory formality, if accompanied by a legacy to the heir-at-law, might not impose upon him the personal obligation of electing whether to take the bequest and give effect to the devise by a voluntary conveyance or keep his land and lose his legacy. Trotter *v.* Trotter, 4 Bli, N. S., 502.

Similar considerations might apply to the construction of a legacy to a wife in respect to whether it was in lieu of dower or not. Washburn *v.* Van Steenwyck, 32 Minn., 336; Van Steenwyck *v.* Washburn, 59 Wis., 483; Lee *v.* Tower, 124 N. Y.,
50 370. So, if the power claimed were one of appointment, that it affected lands in this State would not deprive the court of the domicil of its right to interpret authoritatively the meaning of the terms employed in the will, which, though drawn in Connecticut, was by the codicil republished in South Carolina; but the power which that court has found to be implied from the language of the testatrix is one of sale. An appointment under a power of appointment as to lands passes the title to them by virtue of the will, which is itself the conveyance and the only one. A power of sale, on the other hand, imports only a power to convey by an independent conveyance drawn and executed with all the formalities and subject to all the conditions incident to ordinary deeds. That the will is duly executed for the disposition of real estate is sufficient to support the exercise of a testamentary power of appointment in the manner directed by the testator; but it is not sufficient to dispense with a deed of the ordinary form where the power is one to sell and convey. The question, then, is no longer simply what wishes the testator has expressed, but whether he has so expressed them as to enable acts to be performed after his decease by his authority which will avail to effectuate these wishes according to the requirements of local law. If the will in question worked a conversion, it is because the executor or the trustee could under its provisions have executed a deed sufficient under the laws of Connecticut to transfer title to real estate. Whether this could
51 have been done or not is necessarily a matter to be decided according to those laws as they may be interpreted by the judiciary of Connecticut. White *v.* Howard, 46 *N.* Y., 144, 159; Wharton on the Conflict of Laws, sec. 597; Page's Estate, 75 Pa. St., 87.

The case of Ford *v.* Ford, 80 Mich., 42, in which the construction given to a Wisconsin will by a Wisconsin court (Ford *v.* Ford, 70 Wis., 19; 72 Wis., 621) as to its working an equitable conversion of the real estate of the testator situated in Michigan was followed, stands upon two grounds: That the decision of the court of the testator's domicil was conclusive, and that it was correct. The latter was, of course, sufficient to support the judgment. Considerable reliance seems also to have been placed on the provision of the code of Michigan that upon probate there of a foreign will affecting property in Michigan it should be disposed of according to the will "so far as said will may operate upon it." Similar weight was properly accorded in Guerard *v.* Guerard, 73 Ga., 506, 509, to a section of the Georgia code making the law of the place where any writing is executed controlling as to its effect. In Crusoe *v.* Butler, 36 Miss., 150, the deed of an executor under a power conferred by an Alabama will was held to pass title to lands in Mississippi, the power having been executed in a manner which the courts of Alabama had adjudged to be sufficient, although not in accordance

with the law of Mississippi. Here, however, the Alabama decision had been rendered in a suit between the same parties or those with whom they were in privity, and that in Mississippi was plainly justified by the doctrine of *res adjudicata*.

52 One of the claims set up in behalf of Nancy B. Clarke remains to be noticed. It is that under the statute of uses no effectual trust in the lands in question was created, since no active duties were imposed upon the trustee.

This position is untenable. The terms of the devise and bequest of his daughter's shares to Mr. Clarke in trust invested him with the legal title, and sufficiently implied a right to hold and manage these estates until the events should occur upon which they were to be turned over to their own control. So far as respects the share of Julia Clarke, her death in infancy has rendered the occurrence of these events impossible; but that Mr. Clarke has now become as to that the holder of a simple naked trust does not affect the fact that his trust was originally an active one. The legal estate devolving upon him and the beneficial estate given to his daughter were vested in each upon the decease of the testatrix. Upon the death of Julia Clarke her interest in any lands in this State under her mother's will passed to her sole heir-at-law, in whose favor the decree appealed from was made.

The superior court is advised to affirm the decree of the court of probate.

In this opinion the other judges concurred.

53 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Appellant's Appeal.

Supreme Court of Errors, Third Judicial District, April Term, 1898.

Estate of JULIA CLARKE, Late of Columbia, South Carolina, but Leaving Real Estate in this District, Deceased.

To the honorable probate court for the district of Bridgeport:

The petition of the subscriber respectfully showeth:

1st. That the deceased, whose estate is now in course of settlement in this district, died intestate and possessed of real estate in this district, as appears more fully by the inventory filed May 28, 1897.

2nd. That divers persons claim to be entitled to have the said real estate set out and distributed to them.

Wherefore, your petitioner makes request that the court hears their claims and ascertain to whom this estate shall be set out and distributed.

(Signed) HENRY P. CLARKE,
Administrator,
By STODDARD & BISHOP,
His Attorneys.

Dated at Bridgeport, this 29th day of May, 1897.

DISTRICT OF BRIDGEPORT, } ss:
Probate Court, }

Estate of JULIA CLARKE, Late of the City of Columbia, South C
lina, Deceased, but Leaving Real Estate in the City of Bridge
in said District.

MAY 29, 189

54 Upon the application of Henry P. Clarke, administ
on said estate as per application on file more fully app
it is—

Ordered, that said application be heard and determined a
probate office, in Bridgeport, in said district, on the 14th da
June, A. D. 1897, at 11 o'clock in the forenoon, and that notic
given of the pendency of said application and the time and p
of hearing thereon, by sending by mail, postage paid, a copy of
application and of this order to the parties in interest on or be
June 1st, 1897, and return make to this court.

ALBERT M. TALLMADGE, *Judg*

Order of Probate Court Ascertaining Heir and Distributee.

At a court of probate holden at Bridgeport, within and for
district of Bridgeport, on the third day of July, 1897.

In the Matter of the Application of HENRY P. CLARKE, Adm
trator of the Intestate Estate of JULIA CLARKE, Praying
Court to Ascertain the Heirs and Distributees of said Estate.

The application aforesaid came to this court on the 29th da
May, 1897, and notice of the hearing thereon was given by the
plicant, in all respects according to the order pertaining there
on file. This court further finds that Nancy B. Clarke, herein
named, received actual notice thereof.

At the time named in said order the applicant appeared.
court found that the deceased died at the age of about five mo
leaving her surviving a father, the said Henry P. Clarke, bu
mother, and a sister, Nancy B. Clarke, of Columbia, in the Sta
South Carolina, but no other brothers or sisters or issue of dece
brothers or sisters, and that the said Nancy B. Clarke is a m
about eight years of age.

Whereupon this court appointed John H. Perry, Esq., of Fair
in Fairfield county, guardian *ad litem* for the said Nancy B. Cl
as by said appointment on file will more fully appear. Said
ter came thence by continuance to the present time, when the
applicant and the said guardian *ad litem* appeared and were
heard thereon.

Upon such hearing, this court finds that the intestate was d
ciled in the State of South Carolina at the time of her decease;
the entire inventoried assets of her estate in this State consist
undivided interest in certain real estate, situated in the tow
Bridgeport, of the value of about $—, which said interest wa

rived from the will of her mother, Julia H. Clarke, who died
55 about four months prior to the decease of the intestate domiciled in the State of South Carolina, an exemplified copy of whose will "and the decision of the supreme court of South Carolina interpreting the same in a case in which the petitioner herein was plaintiff and Nancy B. Clarke was defendant," is on file and of record in this court and hereby referred to, and whose estate is as yet unsettled and undistributed.

Wherefore this court finds and decrees that the sole heir and distributee of the estate of the intestate is her aforesaid sister, Nancy B. Clarke.

ALBERT M. TALLMADGE, *Judge.*

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Court of Probate, District of Bridgeport, July 21, 1897.

In re Estate JULIA CLARKE, Late of the City of Columbia, State of South Carolina, Deceased, but Leaving Estate in This District.

To the honorable court of probate in and for the district of Bridgeport, in the county of Fairfield, State of Connecticut, Greeting:

Henry P. Clarke, of the city of Columbia, State of South Carolina, respectfully represents:

1. That he is the father and only surviving parent of the said Julia Clarke, deceased.

2. That he is an heir-at-law and distributee of the estate of the said Julia Clarke, deceased.

3. That he is aggrieved by the order and decree of this court, made on the 3rd day of July, A. D. 1897, as by said decree on file more fully appears, declaring one, Nancy B. Clarke, of said city of Columbia, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased.

The said Henry P. Clarke therefore moves an appeal from the said decree of this court of probate to the superior court, to be holden in and for the county of Fairfield, and State of Connecticut (in which county said court of probate was held) on the first Tues-
day of September, A. D. 1897, and he offers and files a suffi-
56 cient bond with surety to the State of Connecticut, to prosecute said appeal to effect and answer all damages in case he fail to make his said appeal and plea therein good.

Dated at Bridgeport this 21st day of July, 1897.

HENRY P. CLARKE,
By STODDARD & BISHOP,
His Attorneys.

At a court of probate held at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, South Carolina, Deceased.

Whereas, Henry P. Clarke, of said Columbia, appeared in court and filed his motion in writing, alleging in substance, that he is the

father and one of the heirs-at-law of the said Julia Clarke, deceased, and as such is interested in said estate, and is aggrieved by the decree of this court dated the 3rd day of July, A. D. 1897, declaring Nancy B. Clarke, of said city of Columbia, South Carolina, to be the sole heir and distributee of the estate of the said Julia Clarke, deceased, and

Whereas, he therefore moves an appeal from the said decree of this court to the superior court of this State, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, A. D. 1897, and offers to give a sufficient bond of prosecution as by said motion on file more fully appears.

This court finds that the said Henry P. Clarke is the father of said deceased, and as such is interested in said estate in such manner that his rights were and are affected by said decree, and therefore allows the said appeal.

And the said Henry P. Clarke lodged in court his bond to the State of Connecticut, in the sum of one hundred dollars, with Wm. D. Bishop, Jr., of Bridgeport, in said county of Fairfield, as surety, conditioned that the said Henry P. Clarke shall prosecute his appeal to effect, and answer all damages in case he fail to make his said appeal and plea therein good, and this court approves and accepts said bond, and orders that it be recorded and lodged on file.

Attest: CHARLES H. PECK,
Acting Judge.

57 At a court of probate holden at Bridgeport, in and for the district of Bridgeport, on the 24th day of July, A. D. 1897.

Estate of JULIA CLARKE, Late of Columbia, S. C., but Leaving Estate in said District, Deceased.

Whereas Henry P. Clarke, of said Columbia, the father of said deceased, has moved an appeal to the superior court, to be holden in and for the county of Fairfield, State of Connecticut, on the first Tuesday of September, 1897, from the decree of this court made on the 3d day of July, A. D. 1897, declaring Nancy B. Clarke to be the sole heir and distributee of the estate of said deceased, which appeal has been allowed:

Therefore, pursuant to the statute in such case provided:

Ordered, that notice of said appeal be given to all persons interested therein, viz., by some proper officer, by leaving with Henry P. Clarke, administrator on said estate, and with John H. Perry, guardian *ad litem* of Nancy B. Clarke, or at his usual place of abode, or by mailing in a registered letter addressed to said Henry P. Clarke, administrator, Columbia, South Carolina, a true and attested copy of the original motion and order, allowing said appeal, at least 12 days before the session of said court to which said appeal is taken, and return made to the court.

Attest: CHARLES H. PECK,
Acting Judge.

STATE OF CONNECTICUT, }
County of Fairfield, } ss:

BRIDGEPORT, *August 12th*, 1897.

Then and there and by virtue hereof, I made service of the within and foregoing original appeal, motion and order, by depositing in the post-office at Bridgeport, Connecticut, postage paid by registered letter, addressed to Henry P. Clarke, administrator, Columbia, South Carolina, a true and attested copy hereof, and afterwards on the same day, in the town of Fairfield, I left a like true and attested copy hereof at the usual place of abode of John H. Perry, in said town of Fairfield, Connecticut.

Attest:

PETER DOOLAN, JR.,
Deputy Sheriff for Fairfield County.

58 *Fees.*

Travel	$1 00
1 copy	1 00
2 services	24
3 endorsements	24
Postage	12
	$4 60

STATE OF CONNECTICUT, }
County of Fairfield, } ss:

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate within and for the district of Bridgeport, in said county of Fairfield, and keeper of the records and seal thereof, hereby certify that I have examined the within and foregoing copy of the original motion of appeal and orders of said court thereon, *in re* estate of Julia Clarke, late of the city of Columbia, State of South Carolina, and have compared all of the foregoing with the original thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

[SEAL.] PATRICK PHELAN, *Clerk.*

STATE OF CONNECTICUT, }
County of Fairfield, } ss:

BRIDGEPORT.

I, Albert M. Tallmadge, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Patrick Phelan, whose name is above written and subscribed, is, and was at the date thereof, clerk of the court of probate, within and for the district of Bridgeport, in said Fairfield county, and keeper of the records and seal thereof, duly commissioned and sworn, that I am well acquainted with his signature, and know the above to be his, and that the above certificate

by him made is in due form to authenticate the records, files and proceedings of said court.

In testimony whereof, I have hereunto set my hand this 27th day of August, A. D. 1897.

ALBERT M. TALLMADGE, *Judge.*

59 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

BRIDGEPORT.

I, Patrick Phelan, clerk of the court of probate, within and for the district of Bridgeport, in said county of Fairfield, hereby certify that Albert M. Tallmadge, whose name is within written and subscribed, is, and was at the date thereof, sole and presiding judge of the court of probate, within and for the district of Bridgeport, in said Fairfield county, duly commissioned and sworn; that I am well acquainted with his signature, and know the above to be his.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, on this 27th day of August, A. D. 1897.

•[SEAL.] PATRICK PHELAN, *Clerk.*

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Order of Notice.

STATE OF CONNECTICUT, } ss:
Fairfield County, }

BRIDGEPORT, *Oct.* 4, *A. D.* 1897.

Upon the appeal of the said Henry P. Clarke from the order and decree of the court of probate, for the district of Bridgeport, now pending in the superior court in and for Fairfield county.

It appearing to and being found by the subscribing authority, that Nancy Barnum Clarke, appellee in the above-entitled case, is absent from this State, residing in Columbia, State of South Carolina.

Therefore ordered, that notice of the pendency of said appeal be given by leaving a copy of said appeal and this order of notice with the said Nancy Barnum Clarke, on or before the 11th day of October, A. D. 1897, by some proper officer or indifferent person.

WM. R. SHELTON,
Clerk of the Superior Court for Fairfield County.

60 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Proof of Service of Appeal and Order on Nancy Barnum Clarke.

Personally appears before me, Thomas D. Green, and made oath that on the eighth day of October, 1897, he served Nancy Barnum Clarke with a copy of Henry P. Clarke's appeal from the order and decree of the court of probate for the district of Bridgeport, now pending in the superior court in and for Fairfield county, State of Connecticut, by leaving with her a copy of said appeal at Asheville,

N. C., where she temporarily resides with her father, the said Henry P. Clarke, and that he also left with her a copy of the notice of the pendency of said appeal on or before the 11th day of October, 1897, and deponent says that he is not related to either Henry P. Clarke or Nancy Barnum Clarke and has no interest in said appeal.

Sworn to before me Oct. 8th, 1897.

F. C. H. DUKES,
Notary Public.

[NOTARIAL SEAL.]

(Filed Oct. 28, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Order of Court Appointing Guardian ad Litem.

It appearing to the court that Nancy B. Clarke, appellee in the above-entitled action, is an infant of the age of nine years and that she has been duly personally served with the appeal and order of notice in the above-entitled action, and an application having been duly made to the court for the appointment of a guardian *ad litem* to appear and defend said action on her behalf; and it appearing to the court that John H. Perry, Esq., is a fit and proper person to act as such guardian *ad litem*, it is hereby

Ordered, that the said John H. Perry be and he is hereby appointed such guardian *ad litem* and is authorized and directed to appear and defend said action in her behalf.

By the court:

WM. R. SHELTON, *Clerk.*

61 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Reasons of Appeal.

For reasons of appeal in the above-named proceeding, the appellant assigns the following:

I.

1. The estate of the intestate in the State of Connecticut consisted of property, all of which is for purposes of distribution, and for the purpose of the ascertainment of heirs and distributees, personal estate.

2. The intestate was, at the time of her death, domiciled in the State of South Carolina and her estate has ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

3. By the laws of South Carolina, the appellant was and is entitled to a distributive share in all the personal estate of the intestate.

II.

1. The court erred in assuming to ascertain the heirs and distributees of the intestate, as all of the estate of the intestate for the purpose of the hearing then before the court consisted of personal property, and the courts of South Carolina alone had jurisdiction to fix and ascertain the heirs and distributees.

III.

1. The court erred in not dismissing the petition for want of jurisdiction to grant the relief prayed for in the application.

By STODDARD & BISHOP, *Attorneys.*

(Filed Oct. 12, 1896.
WM. R. SHELTON, *Clerk.*)

62 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Reply to Reasons of Appeal.

Paragraph one of the first reason of appeal is denied.
Paragraphs two and three are admitted.
The second and third reasons of appeal are denied.

NANCY B. CLARKE,
By her guardian *ad litem*, JOHN H. PERRY.

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, October 12, 1897.

Finding of Facts and Reservation.

Finding.

1. Henry P. Clarke, the appellant, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which then became their domicile of marriage.

2. In 1889, a daughter, Nancy B. Clarke, was born, who still survives, and is the appellee herein.

3. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage.

4. On February 10, 1894, the wife, Julia H. Clarke, died.

5. On May 20, 1894, the daughter, Julia Clarke, died, leaving no creditors.

6. At all times after said marriage the State of South Carolina has been the domicile of the appellant and his family.

7. During coverture and at the day of the dates thereof the
63 said Julia H. Clarke made and executed the will and codicil hereunto annexed and marked Exhibits A and B respectively.

8. Said will and codicil were duly established in the court of probate for Richland county in the State of South Carolina, and copies thereof have become part of the files and records of the probate court for the district of Bridgeport, pursuant to the provisions of sec. 550 Gen'l Statutes.

9. The daughter, Julia Clarke, owned no property in Connecticut at the time of her decease except such as had or should come to her under her mother's aforesaid will.

10. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease consisted of $825.25 in personalty, the home plantation in South Carolina valued at $20,000, and real estate in Bridgeport, in this State, valued at $138,000, which last-mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7, 1891, leaving a will under which she took a legacy of $100,000, (paid before said partial distribution) and one-sixth of the residue of his estate.

11. The estate of the daughter, Julia Clarke, referred to in the petition to the court of probate, consisted of an undivided one-third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars.

12. Both real estate and personal property of large value remained in the said Barnum residue at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York and Kansas.

13. Henry P. Clarke (the appellant herein) "as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will" brought suit against Nancy B. Clarke (the appellee herein) in the circuit court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true construction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper."

64 A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged and decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

14. This judgment was upon appeal subsequently affirmed by the court of last resort in South Carolina, as will appear by reference to the report thereof in 46 So. Car., 230, which is hereby made a part hereof, and said decision was considered by the probate court from which the appeal is taken.

15. By the law of the State of South Carolina, the court to which the action was brought, mentioned in paragraph 13 hereof, had jurisdiction both of the persons and of the subject-matter of that suit, and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased.

16. The intestate was at the time of her death domiciled in the State of South Carolina and her estate has, ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

17. Nancy B. Clarke has had actual notice of the pendency of this appeal, and John H. Perry, Esq., has been duly appointed by this court her guardian *ad litem*.

EXHIBIT A.

I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

First: I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

Second: I direct that a portion of my estate sufficient to produce one thousand dollars ($1,000) annually, shall be safely in-
65 vested by my executor and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

Third: I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars, ($10,000).

Fourth: I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand ($5,000) dollars.

Fifth: The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children

to be held in trust as above provided in the case of Nancy as being the only one.

And I give devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be executor and trustee of this my will, and direct that no bonds be required of him under either appointment.

In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D. 1891.

JULIA H. CLARKE. [SEAL.]

Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who in her presence and at her request, and in the presence of each other, have signed our names as witnesses thereto.

WILLIAM H. COMLEY, Bridgeport, Conn.
JOSEPH J. ROSE, " "
GEORGE P. CARROLL, " "

66 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

BRIDGEPORT, *May* 26, 1891.

Personally appeared before me, William H. Comley, Joseph J. Rose and George P. Carroll, who, each being duly sworn by me, deposes and says, that they were present and saw Julia H. Clarke sign the foregoing will and heard her declare the same to be her last will and testament. That she signed said will in the presence of all of said witnesses and they each subscribed said will as witnesses in her presence, in the presence of each other, and at her request, and that at the time of signing said will she appeared to be of lawful age, and they and each of them believe her to have been of sound mind and memory, and they make this affidavit at her request.

WILLIAM H. COMLEY.
JOSEPH J. ROSE.
GEORGE P. CARROLL.

Subscribed and sworn to before me this 26th day of May, A. D. 1891.

[SEAL.] CHARLES SHERWOOD,
Notary Public. State of Connecticut.

EXHIBIT B.

State OF COLUMBIA, }
County of Richland. }

I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my

last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same.

First: I hereby ratify and confirm my said will in every respect save as far as any part of it is inconsistent with this codicil.

Second, I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

Three: I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate which shall at that time be invested for her benefit under the second item of this
67 codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death then the investment directed for her benefit under item two of this codicil, shall be and is hereby disposed of as directed in item five of my said will.

Four: I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit as directed in item two of said will, shall then become a portion of my estate and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

In witness whereof, I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in the said State, this the 11th day of November, A. D. 1893.

JULIA H. CLARKE. [L. S.]

Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELEANOR R. BENNETT.
JOHN S. VERNER.
F. H. WESTON.

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Fairfield County Superior Court, October 12, 1897.

Reservation.

The court finds the facts in the above-entitled case to be as set forth in the above finding of facts, and with the consent of all the parties to said cause, all the questions of law which may arise or

may be raised upon the record in said cause, and as to what advice shall be given and to whom, or what judgment should be rendered in said case, are hereby reserved for the consideration and
68 advice of the supreme court of errors to be held at Bridgeport, within and for the third judicial district, on the fourth Tuesday of October, A. D. 1897.

ELMER, *Judge.*

(Filed Oct. 12, 1897.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE, OF COLUMBIA, SOUTH CAROLINA. APPEAL FROM PROBATE.

Superior Court, Fairfield County, March 4, 1898.

Judgment.

The above-entitled cause came to this court on the first Tuesday of September, 1897.

The appellant appeared and this court, on the fourth day of October, 1897, ordered notice of the pendency of said appeal to be given to Nancy Barnum Clarke, the appellee therein, as by said order on file will more fully appear.

Said order was duly complied with, and on the 12th day of October, 1897, this court appointed John H. Perry, Esq., guardian *ad litem* to appear and defend said action, in behalf of the said Nancy B. Clarke, appellee. Thereupon the said appellant and the said Nancy B. Clarke, by her said guardian *ad litem*, appeared and were at issue as on file and upon hearing duly had, this court found the facts as follows:

1. Henry P. Clarke, the appellant, while domiciled in the State of South Carolina, intermarried with Julia Hurd, in the State of New York, in the year 1886, and the married couple immediately returned to the State of South Carolina, which then became their domicile of marriage.

2. In 1889, a daughter, Nancy B. Clarke, was born, who still survives and is the appellee herein.

3. In December, 1893, another daughter, Julia Clarke, the distribution of whose estate is now in question, was born. There were no other children born of said marriage.

4. On February 10, 1894, the wife, Julia H. Clarke, died.

5. On May 20, 1894, the daughter, Julia Clarke, died, leaving no creditors.

69 6. At all times after said marriage the State of South Carolina has been the domicile of the appellant and his family.

7. During coverture and at the day of the dates thereof, the said Julia H. Clarke made and executed the will and codicil hereunto annexed and marked Exhibits A and B respectively.

8. Said will and codicil were duly established in the court of probate for Richland county in the State of South Carolina, and copies thereof have become part of the files and records of the probate

court for the district of Bridgeport, pursuant to the provisions of sec. 550, Gen'l Statutes.

9. The daughter, Julia Clarke, owned no property in Connecticut at the time of her decease except such as had or should come to her under her mother's aforesaid will.

10. The property of the mother, Julia H. Clarke, possessed by her at the time of her decease consisted of $825.25 in personalty, the home plantation in South Carolina valued at $20,000, and real estate in Bridgeport, in this State, valued at $138,000, which last-mentioned property was distributed to her the day before her death in a partial distribution of the estate of her grandfather, P. T. Barnum, who died April 7, 1891, leaving a will under which she took a legacy of $100,000 (paid before said partial distribution), and one-sixth of the residue of his estate.

11. The estate of the daughter, Julia Clarke, referred to in the petition to the court of probate, consisted of an undivided one-third interest in the real estate so as above distributed to her mother. The value of the said Julia H. Clarke's entire interest in the estate of her grandfather was several hundred thousand dollars.

12. Both real estate and personal property of large value remained in the said Barnum residue at the death of the mother, Julia H. Clarke, for future distribution. The real estate so remaining is situated in Connecticut, New York and Kansas.

13. Henry P. Clarke (the appellant herein) "as executor of the last will and testament of Julia H. Clarke and trustee of the estate of Nancy B. Clarke, his infant daughter, under said will" brought suit against Nancy B. Clarke (the appellee herein), in the circuit court for the fifth judicial circuit of South Carolina, praying for the "judgment and direction of the court in regard to the true con-
70 struction of said will and especially the fifth and residuary paragraph thereof, and as to his powers and duties as such executor and trustee under said will in the premises and for such further relief as may be just and proper."

A guardian *ad litem* was appointed for the infant defendant, who duly answered, and, after hearing had, the court "ordered, adjudged and decreed that the will of the testatrix, Julia H. Clarke, worked an equitable conversion into personalty at the time of her death of all her real estate of whatsoever description and wheresoever situated, and that the plaintiff as executor, receive, administer and account for the same as personalty, and that he is by the said will authorized and empowered to sell and convey the same for the purpose of executing said will, and that he have leave to apply for further orders and directions upon the foot of this decree."

14. This judgment was upon appeal subsequently affirmed by the court of last resort in South Carolina, as will appear by reference to the report thereof in 46 So. Car., 230, which is hereby made a part hereof, and said decision was considered by the probate court from which the appeal is taken.

15. By the law of the State of South Carolina, the court to which the action was brought, mentioned in paragraph 13 hereof, had jurisdiction both of the persons and of the subject-matter of that

suit, and by a like law the appellant shared equally with his surviving child in the distribution of the estate of the deceased.

16. The intestate was at the time of her death domiciled in the State of South Carolina and her estate has, ever since the first day of February, 1897, been in due process of settlement in the proper courts of that State.

17. Nancy B. Clarke has had actual notice of the pendency of this appeal, and Jol H. Perry, Esq., has been duly appointed by this court her guardian *ad litem*.

EXHIBIT A.

I, Julia H. Clarke, wife of Henry P. Clarke, residing near Eastover, in Richland county, State of South Carolina, being of sound and disposing mind and memory, do make and ordain this my last will and testament and hereby revoke all other wills by me at any time heretofore made.

71 First: I direct that all my just debts and my funeral expenses shall be fully paid by my executor hereinafter named.

Second: I direct that a portion of my estate sufficient to produce one thousand dollars ($1,000) annually, shall be safely invested by my executor and the said one thousand dollars be paid annually to my father, S. H. Hurd, now of New York city, in quarterly payments, during the term of his natural life.

Third: I give and bequeath to Mrs. Laura Sherwood, of Bridgeport, Connecticut, the sum of ten thousand dollars ($10,000).

Fourth: I give and bequeath to Miss Agnes C. Patterson, of said Bridgeport, the sum of five thousand dollars ($5,000).

Fifth: The rest, residue and remainder of my estate, real and personal, of whatever description or wheresoever situated, I give, devise and bequeath as follows: One-half thereof to my husband, Henry P. Clarke, and one-half thereof to my said husband in trust for my daughter, Nancy, until she becomes twenty-five years of age, and then to pay the whole sum over to her. But if she shall marry before that age with the consent and approval of her father, or in case of his death, with the consent and approval of her then guardian, then I direct that one-half of her share shall be paid to her upon her marriage and the other half when she becomes twenty-five.

In case I shall leave surviving me one or more children beside my daughter Nancy, then I direct that the said rest, residue and remainder of my estate shall be divided equally among my said husband and all of my children, share and share alike, my husband and my children sharing *per capita*, and the shares of said children to be held in trust as above provided in the case of Nancy as being the only one.

And I give devise and bequeath the said rest, residue and remainder as aforesaid, to each and to their heirs and each of them forever.

I constitute and appoint my said husband, Henry P. Clarke, to be

executor and trustee of this my will, and direct that no bonds be required of him under either appointment.

In witness whereof, I have hereunto set my hand and seal at Bridgeport, Connecticut, this twenty-fifth (25th) day of May, A. D., 1891.

JULIA H. CLARKE. [SEAL.]

Signed, sealed, published and declared as and for her last will and testament by the said Julia H. Clarke in our presence, who in her presence and at her request, and in the presence of each
72 other, have signed our names as witnesses thereto.

WILLIAM H. COMLEY, *Bridgeport, Conn.*
JOSEPH. J. ROSE, " "
GEORGE P. CARROLL, " "

STATE OF CONNECTICUT, }
County of Fairfield, } *ss:*

BRIDGEPORT, *May* 26, 1891.

Personally appeared before me, William H. Comley, Joseph J. Rose and George P. Carroll, who, each being duly sworn by me, deposes and says, that they were present and saw Julia H. Clarke sign the foregoing will and heard her declare the same to be her last will and testament. That she signed said will in the presence of all of said witnesses and they each subscribed said will as witnesses in her presence, in the presence of each other, and at her request, and that at the time of signing said will she appeared to be of lawful age, and they and each of them believe her to have been of sound mind and memory, and they make this affidavit at her request.

WILLIAM H. COMLEY.
JOSEPH J. ROSE.
GEORGE P. CARROLL.

Subscribed and sworn to before me this 26th day of May, A. D. 1891.

[SEAL.] CHARLES SHERWOOD,
Notary Public, State of Connecticut.

EXHIBIT B.

State OF COLUMBIA, }
County of Richland. }

I, Mrs. Julia H. Clarke, wife of Henry P. Clarke, formerly residing near Eastover, in the county and State aforesaid, but now residing in the city of Columbia, of said county and State, having made my last will and testament bearing date the 25th day of May, A. D. 1891, at Bridgeport, in the State of Connecticut, do now make this codicil to be taken as a part of the same.

First: I hereby ratify and confirm my said will in every respect save as far as any part of it is inconsistent with this codicil.
73 Second: I hereby revoke the third *item* of said will, and in lieu thereof I will and direct that a portion of my estate

sufficient to produce five hundred dollars annually, shall be safely invested by my executor, and the said five hundred be paid annually in quarterly payments to Mrs. Laura Sherwood, of Bridgeport, Conn., during the term of her natural life.

Three: I further will and direct that after the death of said Mrs. Laura Sherwood that the portion of my estate which shall at that time be invested for her benefit under the second item of this codicil, shall then become a portion of my estate, and is hereby disposed of as directed in item five of my said will; and I further direct that if said Mrs. Laura Sherwood shall die before my death then the investment directed for her benefit under item two of this codicil, shall be and is hereby disposed of as directed in item five of my said will.

Four: I further will and direct that after the death of my said father, S. H. Hurd, that the portion of my estate which shall at that time be invested for his benefit as directed in item two of said will, shall then become a portion of my estate and shall be disposed of as directed in item five of my said will; and I further direct that if my said father shall die before my death then the investment directed for his benefit in said item two shall be disposed of as directed in item five of my said will.

In witness whereof, I, the said Julia H. Clarke, have hereunto subscribed my name and set my seal to the foregoing codicil of four items, at Columbia, in the said State, this the 11th day of November, A. D. 1893.

JULIA H. CLARKE. [L. S.]

Signed, sealed, published and declared by the said Julia H. Clarke, the testatrix, as and for her codicil to her last will and testament in the presence of us, who at her request, in her presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ELEANOR R. BENNETT.
JOHN S. VERNER.
F. H. WESTON.

Upon the facts aforesaid the appellant claimed and contended that the decision and decree of the circuit court for the 5th judicial circuit of the State of South Carolina, being the court of common pleas and general sessions for Richland county, affirmed by the supreme court of said State, 46 So. Car., 230, in the case of Henry P.
74 Clarke, executor and trustee, against Nancy B. Clarke, in its interpretation and construction of the will of the said Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix wherever situated, was binding and conclusive on the courts of this State in his favor in this proceeding, and that to hold otherwise would be to deny full faith and credit to the judicial proceedings and judgment of the State of South Carolina, and would be in contravention of section 1, article 4, of the Constitution of the United States.

And the appellant further claimed, in case said last claim was overruled, that the said will by a proper construction and interpretation thereof, worked an equitable conversion of all the real estate of the testatrix into personalty.

The appellee controverted the aforesaid claims of the appellant.

Whereupon all the questions of law which arise or might be raised upon the record in said cause, and the question as to what judgment should be rendered therein, were reserved for the consideration and advice of the supreme court of errors, to be held at Bridgeport, within and for the third judicial district, on the 4th Tuesday of October, A. D. 1897, which said court on the 6th day of January, 1898, advised this court to overrule the appellant's claims and to affirm the decree of the court of probate appealed from.

Whereupon the said cause having come by legal continuance to this present day, the parties aforesaid again appeared and were duly heard, and pursuant to the advice of the supreme court of errors this court overrules the claims of the appellant, as above set forth, and the judgment of this court is that the order and decree of the court of probate appealed from be and the same is hereby affirmed.

THAYER, *J.*

75 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, March 8, 1898.

Appellant's Notice of Appeal.

The appellant in the above-entitled appeal, within one week after the rendition of the judgment in said cause and in pursuance of section 4 of chapter 194 of the Public Acts of 1897, hereby appeals from the judgment of the superior court in said cause.

By STODDARD & BISHOP,
His Attorneys.

(Filed March 9, 1898.
WM. R. SHELTON, *Clerk.*)

HENRY P. CLARKE'S APPEAL FROM PROBATE.

Superior Court, Fairfield County, March 12, 1898.

Appellant's Appeal.

In the above-entitled cause the appellant appeals from the judgment of said court, to the supreme court of errors, next to be holden at Bridgeport, on the third Tuesday of April, 1898, in and for the third judicial district, for the revision of the errors which he claims to have occurred on the trial thereof, and for reasons of said appeal he assigns the following:

1. That the court erred and mistook the law in holding and deciding on the facts found that the order and decree of the court of probate appealed from should be affirmed.

2. That the court erred in everruling the claim of the appellant

that the decision and decree of the circuit court for the fifth judicial circuit of the State of South Carolina, being the court of common pleas and general sessions for Richland county, as affirmed by the supreme court of said State, in the case of Henry P. Clarke, executor and trustee, against Nancy B. Clarke, in its interpretation and construction of the will of Julia H. Clarke, to the effect that said will worked an equitable conversion into personalty at the time of her death of all the real estate of the testatrix wherever situated, was binding and conclusive on the courts of this State, in favor of said Henry P. Clarke, in this proceeding, and that to hold other-
76 wise would be to deny full faith and credit to the judicial proceedings and judgment of the State of South Carolina, and would be in contravention of section 1, article 4 of the Constitution of the United States.

3. The court erred in overruling the claim of the appellant that the will of the said Julia H. Clarke worked an equitable conversion of all the real estate of the testatrix into personalty.

He, therefore, prays for such relief as is provided by law in the premises.

By STODDARD & BISHOP,
His Attorneys.

I certify that the foregoing appeal was filed on the 12th day of March, A. D. 1898, and Goodwin Stoddard, of Bridgeport, Connecticut, is recognized in the sum of one hundred dollars, conditioned that the said Henry P. Clarke shall prosecute said appeal to effect, and pay all costs therein if he shall fail to do so; and said appeal is hereby allowed.

WM. R. SHELTON, *Clerk.*

Superior Court, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said superior court.

Attest: WM. R. SHELTON, *Clerk.*

Supreme Court of Errors, Fairfield County.

CLERK'S OFFICE.

The above and foregoing is a true copy of record in said supreme court of errors.

Attest: WM. R. SHELTON, *Clerk.*

77 At a supreme court of errors in the third judicial district, holden at Bridgeport on the third Tuesday of April, 1898.

HENRY P. CLARKE, OF COLUMBIA, SOUTH CAROLINA. APPEAL FROM PROBATE.

HENRY P. CLARKE, of Columbia, South Carolina, Appellant,
—
NANCY B. CLARKE, by Her Guardian *ad Litem*, John H. Perry, Appellee.

On Appeal from the Superior Court. No. 5.

This appeal by the appellant, claiming error in the process, record, and judgment and in the proceedings and decisions of the court on questions of law arising in the trial, as may appear in the certified transcript of record and finding of facts on file in this court, was allowed by the superior court for Fairfield county on the 12th day of March, 1898, and came to this court at its session at Bridgeport on the third Tuesday of April, 1898, when the parties appeared and were fully heard; and now this court finds that in the record, judgment, and proceedings of said superior court there is no error.

It is therefore considered and adjudged that there is no error, and that the appellee recover of the appellant $— costs.

By the court:

WM. R. SHELTON, *Clerk.*

78 HENRY P. CLARKE'S APPEAL FROM PROBATE.

Per Curiam:

It is stated by the counsel for the appellant that this appeal has been taken in order to lay a foundation for a writ of error from the Supreme Court of the United States.

It was unnecessary for that purpose. Such writs of error run to the highest court of the State in which a decision in the suit could be had. U. S. Rev. Stat., § 709. In the present case the superior court may properly be regarded as occupying that position. On the reservation upon which it previously came here (Clarke's appeal from probate, 70 Conn., 195) the superior court was advised to render the precise judgment which is the subject of this appeal. This advice was mandatory. No other decision could have been pronounced by the superior court than that which was pronounced. It was the last word of the judicial authority of this State. No right remained to review here a judgment which this court had on full consideration advised the superior court to render. It was therefore reviewable on a writ of error issuing directly to that court from the Supreme Court of the United States. Gregory *v.* McVeigh, 23 Wall., 294; Foote *v.* Women's Board of Missions, 162 U. S., 439. It is true, however, that under circumstances quite similar such writs have been addressed to the highest court in the State, and that this court has recognized the validity of that method of procedure. Atherton *v.* Fowler, 91 U. S., 143; New Haven & Northampton Co. *v.* State, 44 Conn., 376, 392. The latter decision
79 was given at a time when the practice in this respect upon writs of error from the Supreme Court of the United States

to State courts could not be considered as fully settled. We shall on this occasion follow the precedent thus established, but have thought it proper to explain our views at length as to the correct practice, so that appeals of this character may not hereafter be unnecessarily brought.

There is no error.

80 STATE OF CONNECTICUT, } ss:
County of Fairfield, }

I, William R. Shelton, clerk of the supreme court of errors of the State of Connecticut within and for the third judicial district and keeper of the seal thereof, hereby certify that the above and foregoing is a true copy of the record and of all proceedings in the cause of Henry P. Clarke's appeal from probate.

Seal Supreme Court of Errors, Conn.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Bridgeport, in said county and State, this 16th day of February, 1899.

WM. R. SHELTON, *Clerk.*

Endorsed on cover: File No., 17,303. Connecticut supreme court of errors. Term No., 718. Henry P. Clarke, plaintiff in error, *vs.* Nancy B. Clarke, John H. Perry, guardian *ad litem* of Nancy B. Clarke, & Henry P. Clarke, as administrator of the personal estate of Julia Clarke, deceased. Filed February 18, 1899.